IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. .....

JAMES R. HILL, A MINOR, BY THEODORE A. HILL, HIS FATHER AND NEXT FRIEND,

Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARGUMENT.

The opinion of the Circuit Court of Appeals (Tr. 81) is reported as James R. Hill, a minor by Theodore A. Hill, his Father and Next Friend *vs.* The Baltimore and Ohio Railroad Company a corporation in 153 F. (2d) 91.

The District Court has wrongfully deprived the petitioner of his right to trial by jury. There was sufficient evidence upon which the case should have been submitted

to the jury's consideration. The trial judge failed to state his reasons for directing a verdict.

The Circuit Court of Appeals bases its opinion principally on *Illinois Central Railroad Co.* v. *O'Connor*, 189 Ill. 559. It is true that the earlier cases held that a railroad company owed no duty as to a trespasser or licensee except to refrain from wilfully and wantonly injuring him. The cases even went so far as to hold that if an engineer saw a trespasser or licensee upon the tracks, he had a right to assume that the trespasser or licensee would see the approach of his train and leave the tracks in time to avoid being injured.

Since the turn of the century a more humane doctrine has been adopted. The law is well settled in Illinois at the present time that when a railroad company permits the public to use portions of its right of way as a passageway, it must exercise some care to avoid injuring those whom it has reason to know may be upon its premises in the exercise of such privilege.

In the case of *Bernier* v. *Illinois Central Railroad Co.* 296 Ill. 464, it appears that for many years, people travelled on foot between parts of the city of Kankakee east and west of the railroad at a place where the street if extended across the railroad track would have been most convenient. The deceased at the time of the accident, started across the tracks on the path and stood close to the east rail of a track on which a freight train was approaching. Under the Court's instruction, the right of recovery was limited to the count charging wilful and wanton injury. The Court said:

> "Where a railroad company has permitted the public to travel over its tracks for a considerable period of time and a considerable number of people have availed themselves of such use, the railroad company must keep a lookout for persons on its track." (p. 471.)

In *C. B. & Q. R. R. Co.* v. *Murowski*, 179 Ill. 77, it appeared that a large number of people crossed the railroad tracks and entered the gate of a factory in going to work. Men in search of employment were accustomed to congregate on the tracks and right of way in front of the gate. On the morning of the injury, the plaintiff had gone there with others for the purpose of getting employment when he was struck by a passing engine. The Court said:

> "Under the facts as they appeared from the evidence it was a question for the jury to determine whether plaintiff was a trespasser or whether he was rightfully on defendant's property at the time he was injured." (p. 82.)

In *Chicago & Alton RR Co.* v. *O'Neil*, 172 Ill. 527, it appeared that a great many people employed in the various establishments about the railroad tracks passed back and forth over the tracks in going to and returning from their employments. (p. 529.) The Court said:

> "The jury could not, from the evidence, believe otherwise than that the place was used by hundreds of pedestrians, and that the engineer knew when he 'kicked' the car down the track without any brakeman or light upon it, that 'swarms' of people were then passing over the tracks in every direction. * * * we are not prepared to say that there was no evidence upon which the jury could base a finding that it was a 'public place open to the public.'" (p. 532.)

In *Pittsburgh, Fort Wayne and Chicago Railway Co.* v. *Callaghan*, 157 Ill. 406, where it appeared that many persons employed in neighboring manufacturing establishments, used a strip of ground occupied by the tracks as a common passageway, the plaintiff attempted to cross the railroad near the west end of two cars standing on the tracks. A flying switch was made and two cars were thrown

against stationary cars causing them to be moved against the plaintiff. The Court said:

> "It appears that for at least three years before the accident it had been used as a passageway and crossing by hundreds of people daily. It was on a curve, where the view of those operating the trains and those seeking to pass over was obstructed. Under such circumstances as this it was the duty of those having control of trains to use care commensurate with the danger."

It thus must be considered as the law of Illinois that where a railroad company has permitted for a long time the public at large to cross over its tracks at a particular place, the railroad company may not with impunity cause injury to such persons. They are charged with knowledge of the presence of such persons and are bound to exercise some care for their safety.

The leading case in Illinois is *Bremer* v. *L. E. & W. RR Co.* 318 Ill. 11. There the deceased, even without the knowledge of the trainmen, was riding in a caboose attached to a freight train. It was charged that the operator of the train was guilty of wilful and wanton conduct which resulted in injury to a person whose presence on the train was not known.

The Circuit Court of Appeals in its opinion was not able to state any valid reason why the principles in this case were not applicable. (Tr. 85.) The Court in the Bernier case said:

> " 'The fact of general use by the public of a track, so as to create a probability of their presence, might make an act which would otherwise be merely negligent so reckless as to indicate a disregard for life or a general disposition to do injury.' * * *
>
> "If there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to

inflict injury, then it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or willfulness (*Walldren Express Co.* v. *Krug*, 291 Ill. 472). What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement. The gross negligence which will justify the presumption of willfulness or wantonness is such as to imply a disregard of consequences or a willingness to inflict injury (*Lake Shore and Michigan Southern Railway Co.* v. *Bodemer, supra*). An intentional disregard of a known duty necessary to the safety of the person, and an entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a willful injury." (p. 17, 18, 20-21.)

The Circuit Court of Appeals seeks to avoid the effect of the cases cited by petitioner with this statement: "It was never established that the defendant was aware of plaintiff's presence on the tracks." (Tr. 85.) That is inconsistent with a former statement wherein the Court said: "It is undisputed that for at least six months prior to the accident, persons passed both ways through the property of the Allied Mills and over the defendant's rails." (Tr. 83.)

We will refer briefly to the evidence showing the use of the way by the public.

Francis Hanauer testified that for a period of at least six months, people wanting to go to the creamery would go through the gate and across the railroad tracks on the beaten path. (Tr. 19.) When one comes down the steps, there is no place he can go except onto the railroad tracks.

They then would go up over the path that goes to the bank west of the crib (Tr. 20.) There were two paths, one west of the loading room and one on the right. The one to the west was north of the railroad track. In order to get to the railroad track, you would have to walk north through the gate (Tr. 22).

Roy Sellers employed at the Allied Mills for 13¼ years, testified he would see people come down the steps onto the railroad tracks. They could go west down the railroad track, go north over the vacant lot, or east down the railroad track. There was a creamery one-half a block south and they carried milk through there at times. (Tr. 31.)

William Tackett lived north of the mill. He testified that he crossed through there two or three times a day in going to the creamery. He had seen people go through the gate quite often going and coming (Tr. 34).

Jerry May, the boy who often went through the Allied Mills with the plaintiff, testified he had been in the habit of going with the plaintiff on his paper route three or four nights a week for a year and a half before the accident. He said that he went across the property of the Allied Mills onto the railroad tracks and that he had seen lots of boys do the same thing. (Tr. 54.)

In view of the testimony of these witnesses, it must be conceded that it was a question of fact for the jury whether the respondent was charged with notice of persons who had been in the habit of crossing over the railroad track at the particular place.

In view of this evidence, the Circuit Court of Appeals was not warranted in saying that it was never established that the respondent was aware of the petitioner's presence on the tracks (Tr. 85). Neither was the Court warranted in saying that it did not believe that the respondent could have been expected to anticipate the petitioner's

presence on the tracks between the cars. (Tr. 86.) There was ample evidence in the record from which the jury might have found that the respondent was charged with notice that the petitioner or some employee of the Allied Mills, or one of the public, might be on the pathway.

It was charged that while the petitioner was proceeding over said tracks, the respondent caused one of said box cars to be moved and propelled to and against the other standing box car and thereby the petitioner was crushed between the couplers of the said box cars (Tr. 4). The respondent in its answer did not deny these allegations (Tr. 5). It must be assumed as true that the respondent caused the box cars to be moved together. The petitioner testified that he saw no trainman there and that no signal or warning was given to him. (Tr. 43.) The respondent was charged with knowledge that the petitioner, employees of the Allied Mills, and the public in general were accustomed to use the pathway through the gate and across the tracks. An intentional disregard of a known duty necessary to the safety of the person and an entire absence of care for the life and persons of others, such as exhibits a conscious indifference to consequences, makes a case of constructive wilfulness. It was a question of fact for the jury to determine whether the negligent conduct of the respondent amounted to wantonness and wilfulness.

Liability to Licensee for Injury Caused by Affirmative Negligence.

It was also charged in the Complaint that the respondent was negligent.

The rule that an owner of premises may be held liable for active negligence to a licensee is firmly embedded in the laws of Illinois. An owner of property who permits

licensees to come upon his premises ought not to escape liability for damages caused by affirmative acts of negligence on his part. If, for instance, one comes upon the premises of a filling station by permission of the owner, it would not seem reasonable to require the owner to render the place physically more safe for the licensee, but the licensee being rightfully upon the owner's premises with his permission, it would seem wrong that the owner should be permitted to carelessly back his automobile against the licensee without being liable.

The rule was first stated by the Supreme Court of Illinois in *Gibson* v. *Leonard,* 143 Ill. 182, 192:

> "* * * the general rule is, that the licensor assumes no duty to the licensee, except the duty to refrain from affirmative or willful acts that work an injury."

The act of respondent in causing cars to be moved against the petitioner and in failing to give proper warning was active as distinguished from passive negligence and under the decisions of Illinois Courts, the matter ought to have been submitted to the jury.

In *McDaniels* v. *Terminal Railroad Ass'n,* 302 Ill. App. 332 (Petition for leave to appeal to Supreme Court denied) the plaintiff's action was based upon personal injuries sustained as a result of being struck by a girder which was thrown from defendant's overhead bridge by its employees. It appeared from the evidence that there was a well-worn pathway along the tracks that passed under the viaduct which was maintained by the defendant. Witnesses testified that the pathway had been there for many years and had been in daily use by members of the public. The defendant maintained that the plaintiff was a trespasser to whom it owed no duty other than not to wilfully and wantonly injure him. The Court held that

the railroad and trespasser cases referred to by the defendant are not applicable under the facts and circumstances shown. The Court said:

> "The defendant company, as shown by the testimony of its employee, knew of the fact that such pathway was used by the general public and under all such circumstances, defendant owed a duty to the plaintiff to watch out for him and for members of the public who might be using such pathway, before throwing objects onto such pathway." (p. 345)

In *Ryan* v. *C. & N. W. Ry. Co.*, 315 Ill. App. 65, the Court in quoting from Prosser on Torts, said:

> "Some courts have gone so far as to say that there is no duty to a licensee other than to refrain from inflicting wilful and wanton injury upon him. As in the case of trespassers, however, an increasing regard for human safety has led to a retreat from this position. It is now generally held as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee." (75-76)

In *Moore* v. *The Ohio Oil Company*, 241 Ill. App. 388, the Court said:

> "The view founded in natural justice, which has the approval of many courts, is that when a landowner has knowingly permitted licensees to use a well defined path or roadway across his premises for some time he should not by any affirmative act make the roadway more dangerous for such licensees without giving them notice of the changed conditions, and if he fails to give notice of the fact that he has made the way more dangerous he will be held to respond in damages for the resulting injury. 20 A.L.R. 202, note; *Corby* v. *Hill*, 4 C.B.N.S. 556; *Morrison* v. *Carpenter*, 179 Mich. 207, 146 N. W. 106; *Sage's Adm'r* v. *Creech Coal Co.*, 194 Ky. 415, 240 S. W. 42; *John* v. *Reick-McJunkin Dairy Co.*, 281 Pa. St. 543, 127 Atl. 143.

> "Where the public has been accustomed to travel a well defined road across one's land, he is liable to a licensee for personal injuries occasioned by a wire or rope stretched across the road if he has given no warning of the changed condition. *Morrow* v. *Sweeney,* 10 Ind. App. 626, 38 N. E. 187; *Carskaddon* v. *Mills,* 5 Ind. App. 22, 31 N. E. 559; *Nashville, C. & St. L. Ry.* v. *Blackwell,* 201 Ala. 657, 79 So. 129; *Holliday* v. *Hewitt,* 15 N. S. W. St. Rept. 257, 8 British Ruling Cas. 573."

An opinion of the Appellate Court is binding authority not only upon said court, but on all inferior courts in the State of Illinois. *Hughes* v. *Medendorf,* 294 Ill. App. 424.

These decisions were cited before the Circuit Court of Appeals but they were dismissed by that Court with these words: "In the situation here appearing, we do not believe the defendant could have been expected to anticipate the plaintiff's presence on the tracks between the cars." (Tr. 86.) As we said before, this is in view of the former statement in the opinion which said: "It is undisputed that for at least 6 months prior to the accident, persons passed both ways through the property of the Allied Mills and over the defendant's rails." (Tr. 83.)

The District Court in directing a verdict usurped the province of the jury. There was evidence from which the jury might rightfully have concluded that the petitioner was a licensee upon the respondent's premises; that the respondent moved the freight car with such a reckless disregard of the person of others as to amount to a wanton act, and there was evidence from which the jury might reasonably have found that the respondent was guilty of active negligence which resulted in petitioner's injury.

In the case of *Bailey* v. *Central Vermont Railroad Co.,*

319 U. S. 350, 87 L. Ed. 1444, the Court in discussing what should be submitted to a jury said:

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence."

Conclusion.

It must be apparent that the lower courts have failed to apply to the admitted facts the established law of the State of Illinois.

We pray the Court to permit an appeal and to reverse the judgment of the Circuit Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner.